Public Prosecutor v Lam Tshin Po & Ors

HIGH COURT (SANDAKAN) — CRIMINAL APPEAL NO S(41) 18 OF 1994
IAN CHIN J
18 AUGUST 1995

Statutory Interpretation *— Penal provisions — Meaning — Whether custodial sentence mandatory or discretionary — Forests Enactment ss 20(2), 30 & 33(1) — Interpretation and General Clauses Act 1963 s 45(1)*

Criminal Procedure *— Sentencing — Offences against Forest Enactment — Appeal — Whether sentence manifestly inadequate — Meaning of penal provisions — Whether custodial sentence mandatory or discretionary*

This was an appeal by the public prosecutor against the sentence imposed on the respondents who were, together with others, jointly charged and convicted of three offences: (1) of unauthorized cutting, collecting, felling and removing of 37 tress from a forest reserve under s 20(2) of the Forests Enactment; (2) of unauthorized possession, custody and control of 37 timber logs, in a forest reserve, under s 30(g) of the Forests Enactment; and (3) of unauthorized erection or construction of a kongsi in a forest reserve under s 20(b)(i) of the Forests Enactment. The two respondents pleaded guilty to the three counts and were each convicted and fined, respectively, RM350, RM300 and RM250 together with the appropriate default imprisonment. No custodial sentence was imposed.

Held, imposing higher fines on the respondents:

The court had a discretion whether to impose a custodial sentence and it was not mandatory to impose a custodial sentence because that section of the Forests Enactment must be read subject to s 45(1) of the Interpretation and General Clauses Act 1963.

[Bahasa Malaysia summary

Ini adalah satu rayuan oleh pendakwa raya terhadap hukuman yang dijatuhkan ke atas penentang yang telah, bersama orang-orang lain, dituduh bersama dan disabitkan atas tiga kesalahan: (1) pemotongan, pemungutan, penebangan dan pengalihan tanpa kebenaran 37 pokok dari satu rizab hutan di bawah s 20(2) Enakmen Hutan; (2) pemilikan, jagaan dan kawalan tanpa kebenaran 37 balak kayu, di dalam satu rizab hutan, di bawah s 30(g) Enakmen Hutan; dan (3) pembinaan tanpa kebenaran satu kongsi di dalam satu rizab hutan di bawah s 20(b)(i) Enakmen Hutan. Kedua-dua penentang mengaku salah kepada ketiga pertuduhan itu dan setiapnya disabitkan lalu dikenakan denda, masing-masing, RM350, RM300 dan RM250 bersama dengan

A hukuman penjara yang berpatutan jika ingkar. Tiada hukuman pemenjaraan dikenakan.

Diputuskan, mengenakan denda yang lebih tinggi ke atas penentang:

B Mahkamah mempuyai budibicara sama ada untuk mengenakan hukuman penjara dan ianya bukan mandatori untuk mengenakan satu hukuman penjara kerana seksyen Enakmen Hutan itu mesti dibaca tertakluk kepada s 45(1) Akta Pentafsiran dan Klausa-Klausa Am 1963.]

C **Notes**

For cases on appeals against sentence, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2246–2265.

Cases referred to

D *Nili Anak Gumbang v PP* [1985] 1 MLJ 464 (refd)
Philip Lau Chee Heng v PP [1988] 3 MLJ 107 (distd)

Legislation referred to

Forests Enactment ss 20(2), 30, 33(1)
Interpretation and General Clauses Enactment 1959 s 38
E Interpretation and General Clauses Act 1963 s 45(1)
Firearms (Increased Penalties) Act 1971 s 4

Mahmud bin Haji Abdullah (Deputy Public Prosecutor) for the appellant.

F *Dennis Rantau* (name of instructing solicitors not noted) for the respondents.

Cur Adv Vult

Ian Chin J: *History*

G This is an appeal by the public prosecutor against the sentence imposed on Lam Tshin Po and Tai Kim Sin @ Tai Kon Yun who were, together with others, jointly charged and convicted of three offences, viz (1) of unauthorised cutting, collecting, felling and removing of 37 trees from a forest reserve under s 20(2) of the Forests Enactment ('the
H Enactment'), (2) of unauthorised possession, custody and control of 37 timber logs, in a forest reserve, under s 30(g) of the Enactment, and (3) of unauthorised erection or construction of a kongsi in a forest reserve under s 20(b)(i) of the Enactment. As for the first offence, the punishment is provided by s 20(2) of the Enactment, the relevant part of which says:

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> ... on conviction shall be punished with imprisonment for a term of not less than thirty days which may extend to seven years and with fine.

The second offence carries the penalty under s 30 of the Enactment, the relevant part of which says:

> ... shall be guilty of an offence and liable to imprisonment for two years and a fine of five thousand dollars.

while the third offence is punishable under the general provision of s 33(1) of the Enactment which provides that the offender:

> ... shall be liable to imprisonment for twelve months and a fine of two thousand dollars.

The said two accused pleaded guilty to the three counts and were each convicted and fined, respectively, RM350, RM300 and RM250 together with the appropriate default imprisonment.

Contentions

Mr Mahmud bin Hj Abdullah, learned deputy public prosecutor, submitted that the fines imposed on the three offences were manifestly inadequate and that the learned magistrate had erred in law in not imposing a jail term for the first offence. The learned deputy submitted that a sentence of imprisonment is mandatory and he, after referring to *Philip Lau Chee Heng v PP* [1988] 3 MLJ 107, which is a decision on the meaning of the words of s 4 of the Firearms (Increased Penalties) Act 1971, viz '... shall be punished with imprisonment for life and with whipping with not less than six strokes', where Chong Siew Fai J (as he then was) held that the section imposes a mandatory sentence of life imprisonment and six strokes' whipping, argued that similarly the words of s 20(2) of the Enactment also impose a mandatory jail sentence and a fine. Mr Dennis Rantau, learned counsel for the two accused, both here and below, argued that the court still has a discretion whether to order imprisonment and learned counsel referred to *Nili Anak Gumbang v PP* [1985] 1 MLJ 464 where the court there dealt with s 56 of the Immigration Enactment 1956 which provided for an offender to be liable to imprisonment for a term of not less than one year and not more seven years and a fine not exceeding $20,000 and whipping and where Power J said (p 465):

> ... It seems to me clear, by virtue of s 38 of the Interpretation and General Clauses Enactment 1959, which states that 'whenever, in or by virtue of any written law, more than one penalty is prescribed for an offence, the use of the word 'and' shall signify that the penalties may be inflicted alternatively or cumulatively ...' that it is open to the Court under the penalty section to impose either a prison sentence or a fine or whipping but that, if the Court does decide to impose a prison sentence, it must be for not less than 1 year.

Clearly, the decision of *Nili Anak Gumbang v PP* was the result of s 38 of the Interpretation and General Clauses Enactment which modified the normal meaning of the word concerned. There is a similar provision in the Interpretation and General Clauses Enactment 1963, of Sabah, and it reads:

A 45(1) Whenever in or by virtue of any State law more than one penalty is prescribed for an offence, the use of the word 'and' shall signify that the penalties may be inflicted alternatively or cumulatively.

Conclusions

B This means that the court still has a discretion whether to impose a custodial sentence and it is not, contrary to what the learned deputy had submitted, mandatory to impose a custodial sentence because that section of the Forests Enactment must be read subject to s 45(1) of the Interpretation and General Clauses Act 1963. *Philip Lau Chee Heng v PP* is distinguishable in that it was a decision on s 4 of the Firearms C (Increased Penalties) Act 1971 from which there is no similar legislation modifying its meaning.

It remains to be considered whether the sentences of the learned magistrate ought to be disturbed on the ground that they were manifestly inadequate. It will be recalled that the two accused were, for the three D offences, each fined RM350, RM300 and RM250. Mr Dennis Rantau had pleaded at length in the lower court and his eloquence had properly moved the learned magistrate to pass the sentences she did. Many extenuating circumstances were adverted to, like the absence of any loss of revenue to the government, the huge financial loss incurred by the two accused as a result of the detention of other logs, numbering E 1,585, which were unconnected with the offences of this case but which detention rendered the logs commercially useless and the huge financial loss as a result of the detention of two tractors which were also unconnected with the offences of this case. The learned magistrate had also taken into account the plea of guilty. Given the circumstances that F were laid before the learned magistrate, I cannot see how it can be said she had erred in not imposing a custodial sentence. However, the fines are mere pin-pricks since the two accused, by their own admissions, are of means which can be considered substantial. I therefore set aside the said fines and instead impose the fines, respectively of, RM2,000, RM1,000 and RM1,000. There shall be imprisonment of one month G for any default in the payment of the fines. The two accused have until tomorrow to pay their fines.

I therefore allow the appeal in the terms I have mentioned, supra.

Order accordingly.

H Reported by Raymond Leung

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